No. 76-1152

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

MAX KAVALER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not reported. The oral opinion of the district court (Pet. App. 3a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on January 20, 1977. The petition for a writ of certiorari was filed on February 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied a fair trial because the prosecutor failed to correct a witness's testimony after the close of the evidence, where the testimony was

substantially correct and peripheral to the issue of guilt or innocence.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to file false claims in connection with services allegedly rendered to patients in administering the Medicaid Act, in violation of 18 U.S.C. 371, and of 13 substantive counts of presenting false claims to the government in connection with services allegedly rendered, in violation of 18 U.S.C. 287. Petitioner was sentenced to concurrent terms of four years' imprisonment. The court of appeals affirmed (Pet. App. 1a-2a).

1. In 1969 petitioner, in association with two other chiropractors, Joseph Ingber and Sheldon Styles,[1] practiced in Jamaica, New York. Ingber and Styles testified that in the course of treatment the three prepared fraudulent treatment plans for submission for reimbursement under Medicaid (Tr. 33-36, 185-187) and that more than one-half of the plans they submitted bore no relationship to the actual services rendered to their patients (Tr. 36). Two office assistants testified that they also prepared treatment plans and invoices for the doctors; they estimated that 50 to 75 percent of these were false (Tr. 51, 397, 424).

Petitioner, Ingber and Styles expanded their practice to include clinics in Brooklyn and Queens, and they established associations with other doctors (Tr. 59, 66-68, 212-214). Two of these other doctors, who participated in the conspiracy, testified at trial about petitioner's involvement in the fraudulent scheme (Tr. 435-436, 439, 499, 513, 559). In addition, 15 of petitioner's patients testified that treatments itemized on plans and invoices submitted by petitioner, and for which he received payment, were not given (Tr. 459, 582-591, 594-597, 611-614, 626-627, 644, 655-656, 663-664, 686, 699, 728, 736, 745, 753, 761).

[1]Ingber and Styles are imprisoned following their pleas of guilty to Medicaid fraud; Styles also is serving a term of imprisonment for income tax evasion.

Petitioner testified in his own behalf. He denied participating in the conspiracy or submitting any false claims. In support of this testimony, petitioner introduced two office diaries. He stated that these diaries covered the period of the conspiracy, and if their descriptions of treatments were accurate they would have established that petitioner provided the treatments for which he received payment (Tr. 1046-1048). Entries relating to the Lee Avenue Clinic ended on May 27, 1971; petitioner testified that he did not work there after that date (Tr. 1104-1105).

In rebuttal, Dr. Hamid Alizadeh, the administrator of the Lee Avenue Clinic, and Gloria Silva, his secretary, testified that they received rent checks for office space in the Clinic, signed by petitioner, through 1973 (Tr. 1257, 1270, 1274). Silva stated that she saw petitioner at the Clinic in 1972 and 1973, but she was not certain that she saw him actually working there (Tr. 1281, 1283).

2. Following his conviction, petitioner filed a motion for a new trial. This motion asserted that Silva had misrepresented petitioner's presence at the Lee Avenue Clinic after 1971, and that the prosecutor was aware of this misrepresentation. The facts relevant to this claim were brought out in a hearing on the motion. Silva, who was called primarily to verify the receipt of rent payments in 1972 and 1973 from petitioner for the Lee Avenue Clinic, was asked by the prosecutor at trial (Tr. 1281-1282):

> Q. Have you seen him [petitioner] around the clinic?

A. Yes.

Q. Have you seen him on nights and days when he treated patients?

A. I seen him on days.

Q. When do you recall was the last year you saw him?

A. The last time I saw him?

Q. Yes.

THE COURT: The last time you saw him treating patients is what the question was.

A. I'm not too sure, '73, '72.

Q. '72 or '73?

A. Yes.

Q. The last payment you saw was January of '74, do you remember him treating patients then?

A. Could be.

MR. WILSON: Your witness.

Defense counsel asked Silva on cross-examination (Tr. 1283):

Q. You said could be, are you positive under oath that you saw him in 1973?

A. Yes, I did.

Q. And in '72?

A. '72, possibly.

Q. And '71?

A. '71, I did.

The following day Silva returned to the courthouse, concerned that she testified falsely under cross-examination that she had seen petitioner *working* at the Clinic after May 1971 (H. Tr. 13-15).[2] She met with the prosecutor and explained her concern. He then showed her a transcript of her testimony on cross-examination; the transcript revealed that she had not testified that she saw petitioner working at the Clinic in 1972 and 1973. Armed with this knowledge, Silva decided not to pursue the matter with the judge (H. Tr. 18-20, 29-32, 83). The prosecutor, convinced that Silva had not testified falsely, prepared a file memorandum about the incident but took no further action (H. Tr. 73).

3. The district court denied petitioner's motion for a new trial. The court found that Silva testified truthfully at trial (Pet. App. 4a), that the prosecutor acted properly (Pet. App. 7a), and that in any event the testimony was "purely peripheral" and did not affect the outcome of the trial, petitioner's guilt having been overwhelmingly established (Pet. App. 6a). The court of appeals affirmed, observing that "there is no reasonable likelihood that the corrected version of [Silva's] testimony would have altered the outcome of the trial in view of the overwhelming evidence" (Pet. App. 2a).

ARGUMENT

Petitioner argues that the prosecutor withheld knowledge of a material falsehood by a witness who desired to recant. As both lower courts found, however, Silva did not testify falsely, her testimony could not have affected the jury's verdict, and the prosecutor did not act improperly.

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[2] "H. Tr." designates the transcript of the hearing on the motion for a new trial.

There is no need for this Court to review these factual findings, concurred in by two lower courts.

Silva testified that she was "not too sure" whether petitioner actually worked in the Lee Avenue Clinic during 1972 and 1973, and that it "could be" that he had worked there, since she had seen him there and he paid rent for an office during those years. Silva reviewed this testimony by reading the transcript; having done so, she did not express any desire to alter it. The prosecutor stated during closing argument that Silva had testified that her "best recollection [was] that [petitioner] worked [in the Lee Avenue Clinic] as late as" 1973 (Tr. 1341-1342). Although that summary was vague, it was not inconsistent either with Silva's testimony or with what Silva had told the prosecutor afterward. After a full airing of the matter in the district court, that court concluded that these facts would not have led it to reopen the case for further testimony by Silva even if the matter had been brought to the court's attention prior to the submission of the case to the jury (Pet. App. 6a).

Assuming *arguendo* that Silva's testimony was misleading concerning the strength of her recollection whether she had seen petitioner working at the Clinic in 1972 and 1973, that the prosecutor improperly allowed this impression to go uncorrected, and that the strictest standards should be applied, we submit that petitioner would be entitled to no relief. The conviction should be set aside only if there were a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103 (footnote omitted). That standard was not met here. Fifteen of petitioner's former patients testified that they did not receive the treatments for which petitioner obtained payments; four fellow doctors or chiropractors testified that petitioner participated in a scheme to submit fraudulent treatment plans and invoices; two secretaries corroborated the details

of this conspiracy. Silva's equivocal testimony had only the most marginal significance, and its truth or falsity did not bear on the jury's verdict.[3] See also *Giglio* v. *United States*, 405 U.S. 150, 154; *Napue* v. *Illinois*, 360 U.S. 264, 271.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]Petitioner contends (Pet. 18) that Silva's testimony, if believed, would contradict his own and thus undermine his credibility. But a parade of other witnesses also had contradicted petitioner's testimony, and they (unlike Silva) had directly implicated petitioner in the frauds he was charged with committing. Moreover, Silva's testimony was qualified by her expressed uncertainty, an uncertainty that petitioner's counsel could have further explored on cross-examination. Whatever additional effect Silva's testimony may have had upon petitioner's credibility is not enough, under the standards of *Agurs*, to require a new trial.